No. 5481

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH BROWNLEE AND BARBARA BROWNLEE,
Appellants,

vs.

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION,
Appellee.

Appellee's Brief

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STATEMENT OF FACTS

This is an action brought by the father and stepmother of Leslie J. Brownlee on an accident insurance policy written by appellee which expired at noon on the 1st of January, 1927. The policy is attached to the complaint as Exhibit "A" and is found in the record at pages 7 to 18. The salient allegation

contained in the complaint is found in paragraph IV thereof on page 4 of the record and is as follows:

> "That on the first day of January, 1927, and prior to 12 o'clock noon of said date and while said policy was in full force and effect, and while the said insured, Leslie J. Brownlee, was on an outing and pleasure trip on Mount Hood, situated in the County of Hood River, State of Oregon, the said Leslie J. Brownlee received and sustained bodily injuries effected through external, violent and accidental means, which said means alone caused his death prior to January 20, 1927."

Issue is joined by the defendant on this allegation (Record, 20).

At the conclusion of the testimony the District Court held that there was no evidence in the record to sustain the allegation above quoted and directed the jury to find a verdict for the defendant. This appeal is prosecuted from a judgment entered on this verdict.

Leslie J. Brownlee, the insured, and his friend, Al Feyerabend, had an ambition to be the first persons to climb Mount Hood in the year 1927. They were experienced in mountain climbing and had climbed Mount Hood on several previous occasions (Record, 31). On the afternoon of December 31, 1926, they went to Battle Axe Inn, which is located on the south slope of the mountain at an elevation of 4000

feet, and which is also on the Mount Hood Loop Highway.

The young men had made preparation for the climb. They were warmly clad and were equipped with snow shoes and crampons, or ice creepers. They each carried sandwiches and four thermos bottles, two filled with hot tomato soup, one with hot tea and the other with a luke-warm solution of orange and lemon juice (Record, 31).

They left Battle Axe Inn at ten o'clock on the night of December 31st and made their way to Timberline Cabin, a distance of four miles. It was after one o'clock when they reached Timberline Cabin, which is six thousand feet above sea level (Record, 31). After resting there an hour they proceeded up the mountain. The sky was overcast and the clouds hung low.

When they reached the hard snow above timber line the young men discarded their snow shoes and put on the crampons, which consist of frame work shaped like a shoe to which sharp spikes are attached (Record, 32).

They proceeded upwards between Palmer Glacier on the right and Zigzag Glacier on the left, the space between these glaciers being at least three-fourths of a mile, and this intervening space offering no serious obstacles to the climb (Record, 33).

About six o'clock in the morning they dug holes in the snow and rested until seven o'clock (Record, 42). At this time they had some hot soup and drank some tea. They then continued their climb. At a subsequent time not fixed by the testimony, but certainly long subsequent to seven o'clock, they stopped for luncheon and each ate half a sandwich (Record, 42). At ten-thirty on the morning of January 1st they were still headed up the mountain and were seen by another party behind them also making the ascent (Record, 65). At this time one of the young men was 100 feet in advance of the other. A storm had come up about nine o'clock on the morning of January 1st and the visibility was no longer good.

At a time subsequent to ten-thirty in the morning the young men were together, again partook of nourishment, and had some conversation (Record, 34, 42). Brownlee expressed the intention of turning back. Feyerabend gave Brownlee his compass and told him that a south course would bring him to the highway near Battle Axe Inn. Feyerabend continued up the mountain. Brownlee turned back and has not been seen since (Record, 34-35; 42-43).

There is no proof that the time when Brownlee parted from Feyerabend was prior to noon, at which time appellee's policy expired (Record, 53). There is clear evidence given by Feyerabend, who was a witness for appellants, that at the time when Brownlee separated from Feyerabend, Brownlee was in

good physical condition, that he talked sensibly and quietly and that he was perfectly normal except that he was tired (Record, 42-43).

After parting with Brownlee, Feyerabend continued the ascent for a time. He then turned back, reaching Timberline Cabin at 2:45 and Battle Axe Inn at 4:30 in the afternoon (Record, 41-42).

The party of four who were behind Brownlee and Feyerabend, consisting of Helen Dimmick, Helen Hansen, LaVerne Coleman and B. W. Clark, abandoned their ascent and started down the mountain at eleven o'clock in the morning (Record, 48, 66). They stopped at Timberline Cabin long enough to make a cup of tea and reached Government Camp (Battle Axe Inn) at three in the afternoon (Record, 66).

Testimony was given as to the existence of crevasses in the ice upon the mountain, particularly in the summer, and of the possibility that such crevasses were not wholly or securely covered with snow in the winter. There was no testimony as to the existence of crevasses on the south slope except in the ice fields; nor was there any testimony as to the existence of crevasses between Palmer Glacier and Zigzag Glacier.

In sustaining appellee's motion for a directed verdict (67) the court below stated (70):

> "Now in this case we may assume that these boys separated at eleven o'clock, and that the weather was all that your witnesses claim, and that the conditions were exactly as they have described them. What is there in the case whereby we can say, or whereby there is a presumption that death occurred at twelve o'clock, or five minutes before twelve, or five minutes after twelve, or at one o'clock, or at two o'clock, and what is there in the case whereby a presumption can be raised that he died at any particular place upon the side of the mountain? Now that matter, I think, would be left to the guess of the jury. The evidence in this case might be sufficient to raise a presumption that the death of deceased was caused by reason of the conditions as they existed at Mt. Hood, January 1, 1927, coupled with the fact that a diligent search has been made for him, and that he has never been found, and the length of time that has transpired since January 1st. All these facts taken together might at this time raise a presumption that death had occurred, but that is as far as it will go. To say that that presumption would give rise to another presumption that he died at a particular time, or particular place, cannot be supported by the authorities. The Supreme Court of this state has decided a number of cases very similar to this, and where the question for consideration was the cause of death, and has held that where that matter is left to the speculation, or to the guess of the jury, a verdict should be instructed. I will instruct the jury to bring in a verdict accordingly."

APPELLANTS' CONTENTION

Appellants contend that upon the evidence presented "the jury could have decided this case with an answer to the following question:

Did Brownlee, prior to noon of January 1st, 1927, fall into a crevasse on Mt. Hood, as a result and by reason of the exposure to the stormy and freezing conditions existing thereon, the effects from which he died at that time or any time prior to January 20, 1927?" (Brief, p. 10.)

ARGUMENT

Sickler's Testimony

Error is assigned on the ruling of the District Court sustaining our exception to a question asked Everett J. Sickler. In order that the court may understand the real issue raised by this assignment of error we quote so much of the record as is relevant to the question raised. The facts are set forth on pages 46 and 47 of the record.

> "Q. Now did Mr. Feyerabend, when he came back—did you ask him anything about Mr. Brownlee?
>
> A. Yes.
>
> Q. Did he make a detailed statement to you at that time?
>
> A. Yes, sir.
>
> Q. What was the statement that he made?"

Appellee objected to the testimony so called for as hearsay and incompetent and the court sustained the objection. In their brief at pages 5 and 6 appellants cite three cases, which are also cited in 22 C. J. 217, to sustain their contentions on this branch of the case. The first of these cases is—

Shear vs. Van Dyke, 10 Hun. 528.

The decision holds as follows:

A witness who aided in taking in hay was asked how many loads were taken in on the occasion specified. He answered that he could not now remember but that he knew at the time and then told the plaintiff. With this basis to support it, the court permitted the plaintiff to testify as to what the witness had told him at the time as to the number of loads of hay taken in.

It is manifest from the record which we have already quoted that appellants have not brought themselves within the rule announced in this decision. Feyerabend was the principal witness for appellants in the court below. He had been on the stand for a long time and had made his own statement as to what happened when he and Brownlee were out on the mountain. The testimony objected to called for a second hand hearsay repetition of what Feyerabend had already testified to on direct and cross examination. The statement sought to be elicited had been

made by Feyerabend to Sickler on the 1st of January, 1927. The case came on for trial on the 27th of March, 1928. The effort of appellants was to get before the jury Sickler's recollection of what Feyerabend had told him nearly fifteen months before. The admission of this testimony would have violated the fundamental rule of the law of evidence, which excludes hearsay testimony.

The record wholly fails to bring appellants within the rule announced in *Shear vs. Van Dyke,* 10 Hun. 528. Feyerabend testified:

> "That it has always been a quandary with the witness as to the time when he separated from Leslie." (39)

> "That he does not remember whether his mind was clear prior to the time that he thought anything had happened to Leslie; that he does not know whether he had a clear memory as to the time when he separated from Leslie prior to learning that something had happened to Leslie; he cannot remember because there are a lot of other things which confused him later on and out of a lot of incidents that took place, he does not remember; that his mental condition was all right when he got back to Government Camp and talked to Mr. Sickler; he has no present recollection and that he does not know whether, at the time he reached Government Camp, his recollection was clear as to the time when he and Leslie separated; that he does not have a clear recollection of when he separated from Brownlee. He does not know. If he ever had a clear recollec-

> tion it would be before the search started. At the time when he arrived at Government Camp he thinks he did have a clear recollection. He does not remember the things that took place before reaching Government Camp because of the strain of the days that followed, since he cannot remember now. He does not remember whether he remembered at the time he reached Government Camp or not the time he separated from Leslie. He has forgotten all of these things. * * * That he made an account of the trip to Mr. Sickler after he returned to Battle Axe Inn, which statement was correct." (40, 41.)

It is manifest that this testimony lays a very different foundation for the question asked than was laid in the New York case on which appellants rely.

The question asked did not relate to some specific fact which was regarded as relevant. The effort of appellants was to introduce the entire statement which Feyerabend had made to Sickler on the 1st of January, 1927.

Hearsay Rule in Oregon

Shear vs. Van Dyke, 10 Hun. 528, does not correctly state the law of evidence as codified in Oregon. *Section 705 Oregon Laws* is as follows:

> "The rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them."

Subsequent sections of the code list the exceptions to the hearsay rule. The most significant section following is *Section 727, subdivision 8,* which is as follows:

> "In conformity with the preceding provisions, evidence may be given on the trial, of the following facts:
>
> (8) The testimony of a witness deceased or out of the state, or unable to testify, given in a former action, suit or proceeding, or trial thereof, between the same parties, relating to the same matter."

There is no other statutory exception to the application of Section 705 supra which permits the reception in evidence of a statement previously made by a witness who sustains no relation to the parties which admits of his binding the party against whom the testimony is sought to be elicited. The construction of the foregoing statute by the Supreme Court of Oregon sustains our contention that the Oregon statutes must be regarded as a code of evidence and that hearsay testimony cannot be received in Oregon unless authority for it can be found in the Oregon code.

Hansen Rynning vs. Oregon Washington Co., 105 Or. 67, 74-73.

In this case testimony was offered under the au-

thority of subdivision 8 of Section 727 O. L. supra. The court said:

> "The statute expressly enumerates the cases in which the testimony given by a witness in a former trial may be proved on a subsequent trial. Unless the case is one coming within those enumerated by the statute, the authority conferred by the statute cannot be exercised."
>
> (Statute discussed.)
>
> "Such seems to be the rule generally in other jurisdictions."

Other authorities announcing the same principle are:

2 Jones on Evidence, p. 795.

Here it is said:

> "The failure of the witness to recollect particular facts, if short of mental incapacity, will not admit proof of his testimony at a former trial. And the mere fact that the witness has forgotten the facts to which he formerly testified is never sufficient to render evidence of his former testimony admissible."

Warren vs. Nichols, 6 Metc. (Mass.) 261.

> "The general rule is that one person cannot be heard to testify as to what another person has declared in relation to a fact within his knowledge and hearing upon the issue. It is the familiar rule which excludes hearsay. The reasons are obvious, and they are two: first, because the

averment of fact does not come to the jury sanctioned by the oath of the party on whose knowledge it is supposed to rest; and secondly, because the party upon whose interests it is brought to bear has no opportunity to cross-examine him on whose supposed knowledge and veracity the truth of the fact depends."

Stein vs. Swensen, 46 Minn. 360, 49 N. W. 55, 57.

"The defendants, having taken by deposition the testimony of Henry Vaughan, and the deposition being in court, are not in position to prove what he swore to on a former trial, on the ground of his being out of the state, even though that be a ground for it in any case. *We do not think his failure to recollect* the particular facts justifies proving his former testimony. When failure of memory amounts to mental imbecility, the witness is as one dead or insane, and, as his testimony cannot then be taken, his testimony upon a former trial of the same issues, between the same parties, may be resorted to. To admit it in any less case would continually present the question, what degree of forgetfulness shall be required."

If the statement, given under oath on a previous trial, is inadmissible, *a fortiori* is an unsworn statement given orally fifteen months before the trial inadmissible and untrustworthy.

No Prejudicial Error

In no event would the court be warranted in reversing the judgment on this assignment of error,

The offer of proof, when the court sustained our objection, was as follows:

> "We offer to prove by this detailed statement that he said that he left Leslie Brownlee at the hour of eleven o'clock and that Leslie looked at his watch at the time he left him and said to him that it was eleven o'clock, and that it was in the vicinity of Crater Rock just below." (Record, 47.)

If this testimony had been received and had been accepted by the court as proof that these two young men separated at eleven o'clock on the morning of January 1, 1927, the testimony would have had no tendency to prove appellants' case. The burden would still have rested upon appellants to show that Brownlee lost his life or sustained a fatal injury within an hour after the time when the young men separated. There is no such proof to be found in the record. Even if this testimony had been received and been regarded as legal proof we would have been entitled to our directed verdict.

Section 391 of the U. S. Code, 40 Statutes at Large 1181, is in part as follows:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

This court has again and again applied this statute. The construction given the statute in these decisions precludes the reversal of this case on the ground now under discussion. See for example—

Madden vs. United States, 20 F. 2d 289, 295.

> "By express provision of law (Judicial Code, Sec. 269, as amended 40 Stat. 1181 (Comp. St. Supp. 1919, Sec. 1246)), we are admonished, upon hearing a writ of error in any case, whether civil or criminal, to give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions, which do not affect the substantial rights of the parties. Upon such an examination of the record, not only are we unable to say affirmatively that there has been a miscarriage of justice, but, on the contrary, it is difficult to see how fair-minded jurors could have reached a different conclusion."

Action On Accident Policy

This is an action upon an "accident policy." The burden of proof devolves upon appellants to prove a loss within the terms of the policy. Proof of death alone is insufficient.

The policy issued by appellee was not a life insurance policy, but what is commonly referred to as an "accident policy." Leslie J. Brownlee, during the term of the policy, was insured against loss of life "resulting directly from bodily injuries sustained through purely accidental means." In order

to recover upon such a policy it is not sufficient to establish the death of the insured, but the proof must establish the occurrence of insured's death in the manner insured against in the policy.

In

Insurance Co. vs. McConkey (1887), 127 U. S. 661, 32 L. Ed. 308

where the policy insured against death "through external, violent and accidental means" the court stated on page 311:

> "Upon the whole case, the court is of the opinion that, by the terms of the contract, the burden of proof was upon the plaintiff, under the limitations we have stated, to show, from all the evidence, that the death of the insured was caused by external violence and accidental means."

Laessig vs. Travellers' Pro. Ass'n (1902), 169 Mo. App. 272, 69 S. W. 469.

> "As mere proof of injury in a damage case will not entitle a plaintiff to recover, but negligence of the defendant must be shown, so in a suit upon an accident policy, mere proof of injury or death will not entitle the plaintiff to recover, but the injury or death must be shown to be due to an accidental cause. And this burden rests upon the plaintiff irrespective of whether or not the defendant pleads or proves that the death was due to a cause excepted from the operation of the policy."

National Masonic Acc. Assoc. vs. Shryock (C. C. A. 8th, 1896), 73 Fed. 774.

This was an action upon an accident policy to recover for the death of the insured alleged to have resulted from a fall upon the pavement. There was no direct proof of the fall. In reversing a judgment for the plaintiff, the court stated on page 775:

> "The burden of proof was upon the defendant in error to establish the facts that William B. Shryock sustained an accident, and that the accident was the sole cause of his death, independently of all other causes."

To like effect see:

National Assoc. Ry. Postal Clerks vs. Scott (C. C. A. 2nd, 1907), 155 Fed. 92, 94.

Carnes vs. Iowa Travelling Men's Assoc. (1898), 106 Ia. 281, 76 N. W. 683, 684-5.

Keefer vs. Pac. Mutual Life Ins. Co. (1902), 20 Pa. 448, 51 Atl. 366.

JURY CANNOT SPECULATE

The proof required the jury to speculate as to the cause of insured's death. Where the proof requires speculation the case is properly withheld from the jury.

(1) An inference cannot be founded upon an inference or a presumption.

Section 796, Oregon Laws.

> "An inference must be founded—
>
> 1. On a fact legally proved; and
>
> 2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities of the person whose act is in question, the course of business, or the course of nature."

Deniff vs. Charles R. McCormick & Co. (1922), 105 Or. 697, 704.

> "The inference predicated upon the letterhead, that defendant was a charterer of the vessel properly did not furnish a basis for the further inference that the charter-party contained terms favorable to plaintiff's right of recovery: Sec. 796 Or. L.; State vs. Hembree, 54 Or. 463 (103 Pac. 1008); Stamm vs. Wood, 86 Or. 174 (168 Pac. 69); State vs. Rader, 94 Or. 432, 456 (186 Pac. 79)."

Joseph vs. Meier & Frank Co. (1926), 120 Or. 117, 119.

(2) Speculation as to manner of death.

Assuming that insured is dead, the proof leaves the manner of his death wholly in the realm of speculation. Based on conjecture his death may be explained in various ways, among which are the following: (1) That insured fell and sustained bodily injuries which resulted in his death; (2) that insured became lost, and having exhausted his food supply, starved to death; (3) that insured, having become tired and exhausted, stopped to rest and subsequently froze to death; or (4) that insured, because of the physical strain to which he had been subjected, died of natural causes.

The situation with respect to the proof as to the cause of insured's death is analogous to negligence cases where the evidence offered shows that the damage complained of may have resulted from a number of causes for only one of which the defendant is responsible.

Where the evidence shows that the damages complained of may have resulted from one of several causes and the defendant is responsible for only one of them, the plaintiff cannot recover.

Reading Co. vs. Boyer (C. C. A. 3rd, 1925), 6 F. (2d) 185.

This was an action to recover for the death of a

brakeman who was killed while in the employ of the defendant railway.

In reversing a judgment for the plaintiff the court stated on page 186:

> "There is no evidence which tended to prove how the accident happened. As we have stated, it might have occurred in one of several ways. The only way conceivably involving negligence of the defendant was the lack of ballast between the main track and the track of the siding. We do not concede that lack of ballast in such a place constituted negligence, yet, assuming that it did, there is no evidence which remotely indicates that the decedent 'lost his footing and was thrown under the train' because of lack of ballast. As there were other ways in which Boyer might have met his death which did not involve negligence of the defendant, the case falls, we think, within the rule of Murray vs. Pittsburgh, etc., R. R. Co., 263 Pa. 398, 403, 107 A. 21, 23, followed by this court in Philadelphia & Reading Ry. Co. vs. Cannon, 296 F. 302, wherein the Supreme Court of Pennsylvania said:
>
> " 'It is not enough for plaintiff to show his injury might have been due to more than one possible cause, for only one of which defendant is responsible. He is obliged to go further and show the cause that fastens liability upon defendant was the proximate one and the jury should not be permitted to base a verdict upon a mere conjecture that the injury was caused by one or the other.'
>
> "This is but another statement of the old rule that a party seeking to recover damages for in-

juries occasioned by negligence must establish negligence by affirmative testimony."

To like effect see:

Parmelee vs. Chicago Milwaukee Co., 92 Wash. 185, 188-191.

Shaw vs. New Gear Gold Mines Co., 31 Mont. 138, 77 Pac. 515, 516.

Wheelan vs. Chicago Milwaukee Co., 85 Ia. 167, 175; 52 N. W. 119, 121-122.

Nervinger vs. Hann, 197 Mo. App. 416, 196 S. W. 39, 42.

Miller vs. Blackburn, 170 Ky. 263, 185 S. W. 864, 866-867.

Chesapeake & Ohio vs. Whitlow, 104 Va. 90, 94, 51 S. E. 182, 183.

Harcker vs. Whitley, 124 Va. 194, 97 S. E. 808, 811.

Searles vs. Manhattan Co., 101 N. Y. 661, 662.

Dobbins vs. Brown, 119 N. Y. 188, 194-195.

Deschenes vs. Railroad, 69 N. H. 285, 46 Atl. 467, 469.

Philadelphia & Reading vs. Cannon (C. C. A. 3rd), 296 Fed. 302, 305-306.

The rule announced in the foregoing cases has also been adopted by the Supreme Court of Oregon.

Spain vs. Oregon-Washington R. & N. Co. (1915), 78 Or. 355, 369.

Plaintiff instituted this action to recover damages for his wrongful ejection from one of defendant's trains and his subsequent confinement in the city jail at Huntington, Oregon. In holding that the aggravation of the wound which was left by reason of a prior amputation of plaintiff's arm could not be considered by the jury as an element of damages, the court stated on page 369:

> "Now, from this testimony, which is wholly from plaintiff's witnesses, there may be drawn several inferences: (1) That the inflammation which ensued upon the 21st was a mere phase of an infection already shown to exist in the wound; (2) that it arose from plaintiff's activities around the race-track at Boise; (3) that it came from unsterilized dressings applied by Mrs. Simms before plaintiff's departure to Boise; or (4) that it arose from unsanitary condition existing in the jail at Huntington. There is no evidence which has a tendency to show from which of these causes the subsequent aggravated condition arose. It might have been from any of them, or, if there exists any reason to differentiate, the first of the possible causes would seem the most probable, as there can be no question under plaintiff's own testimony but that some infection resulting in a discharge of pus existed at the time he left for Boise. That his arm was not in an entirely satisfactory condition while at

> and returning from Boise is shown by his complaint, which alleges that he was 'suffering from a recently amputated arm and was then on his way to consult his regular physician.' When the evidence leaves the case in such a situation that the jury will be required to speculate and guess which of several possible causes occasioned the injury, that part of the case shall be withdrawn from their consideration: Armstrong vs. Town of Cosmopolis, 32 Wash. 110 (72 Pac. 1038). So far as the wrongful arrest, detention and imprisonment, and the filthy condition of the jail are concerned, the plaintiff made a case sufficient to go to the jury; but the court should have withdrawn from their consideration the subject of the effects of these acts upon the condition of plaintiff's arm as constituting an element in plaintiff's recovery."

Medsker vs. Portland R. L. & P. Co. (1916), 81 Or. 63.

This case involved a situation analogous to that in the present action. A lineman employed by the defendant company, while upon a pole, fell to the ground and sustained injuries resulting in his death. From the proof offered it was uncertain whether his fall was caused by shock or by losing his balance. In holding that a verdict was properly directed for the defendant, the court stated on page 69:

> "This constitutes the entire testimony relating to the cause of the injury. The death was undoubtedly occasioned by the fall, but whether the descent resulted from coming in contact with the south guy wire, or was caused by the deceased losing his balance, is problematical. In Spain

vs. Oregon-Washington R. & N. Co., 78 Or. 355 (153 Pac. 470, 475), Mr. Justice McBride, in discussing the uncertainty of such testimony, observes:

> " 'When the evidence leaves the case in such a situation that the jury will be required to speculate and guess which of several possible causes occasioned the injury, that part of the case should be withdrawn from their consideration.' "

To like effect see:

Mt. Emily Timber Co. vs. O. W. R. & N. Co. (1916), 82 Or. 185, 200.

Street vs. Ringsmyer (1923), 108 Or. 349, 357.

Although the question has seldom arisen, the authorities uniformly hold that the plaintiff in an action on an "accident policy" has failed to establish a sufficient case where the jury is required to speculate as to the cause of death.

Wright vs. Order of U. T. C. (1915), 188 Mo. App. 457, 174 S. W. 833.

This was an action to recover upon an accident policy for the death of the insured, who died while operating a hand saw in a cramped position on a warm day. Expert testimony was offered by plaintiff to the effect that insured died from a ruptured

artery. In reversing a judgment for plaintiff, the court stated on pages 834 and 835:

> "But it is argued that it is competent to receive expert evidence in matters of this character, and the several witnesses for plaintiff attribute the death of the insured to the rupture of an artery, and this will suffice, for obviously it was not anticipated as a result of the act of driving a handsaw which he was performing at the time. But, though the witnesses so say, they each and all testify as well that they had no positive information touching the matter of a ruptured artery. This being true, it is essential, then, to find, through inference alone, that the insured suffered a ruptured artery. This inference, by which the ruptured artery is said to be ascertained, is based upon the fact of the pallid and congested condition appearing about the face and head of the insured, the sudden death which overcame him, and the temporary strain he underwent in the labored effort of driving the saw. But, although it be conceded that deceased came to his death from a ruptured artery, this will not suffice to authorize a recovery as for accident, because such frequently occurs, as other evidence in the case reveals, from natural causes alone and aside from accident entirely.
>
> * * * * *
>
> "Therefore it is obvious that, in order to establish a right to recover, sufficient facts must be detailed in evidence to afford legitimate inferences, and it will not suffice to establish a fact in the case by drawing an inference from other facts and then undertake to establish still another fact by utilizing the fact first established through inference alone as a basis, for a

further inference of fact. In other words, as is frequently said, presumption may not be raised upon other presumptions nor inference piled upon other inferences in support of a verdict. United States vs. Ross, 92 U. S. 281, 23 L. Ed. 707; Hamilton vs. Kansas City Southern R. Co., 250 Mo. 714, 157 S. W. 622; Glick vs. Kansas City, etc. R. Co., 57 Mo. App. 97, 104; Richmond vs. Aiken, 25 Vt. 324; McAleer vs. McMurray, 58 Pa. 126; 1 Rice on Evidence, Sec. 34; Lawson's Presumptive Evidence, rule 118, p. 652; Whitesides vs. Chicago, B. & Q. R. Co., 172 S. W. 267.

"In order to find that the insured came to his death through accidental means, the jury essentially employed inference, for there is no direct evidence of the fact that he suffered a ruptured artery; and, having inferred this much, it inferred too, by resting another inference thereon, that such ruptured artery was occasioned through accidental means rather than from natural causes by the extraordinary blood pressure incident to the strain under which William N. Wright labored at the time. Although the first inference was a legitimate one, the second was not, for it was not based on competent matter of fact. Such being true, the verdict rests upon mere conjecture rather than on matter of fact deduced from the evidence."

On a rehearing of the case the court adhered to its original opinion, stating on page 836:

"Here, in the instant case, there is no positive and direct evidence that Mr. Wright, the assured, suffered a rupture of an artery, and the evidence to that effect is upon evidence entirely,

which, as above said, authorizes the jury to do no more than infer the death resulted from a rupture of an artery. Indeed, the evidence of the physicians is but inference on their part, and therefore a conclusion. Having ascertained the ruptured artery through utilizing first the inference or opinion of the physician that deceased suffered a ruptured artery, it appears that a second inference is employed in the process of arriving at the verdict to the effect that such ruptured artery resulted from accidental means rather than from a natural cause. Obviously a judgment resting upon inference piled upon inference, may not be sustained."

National Ass'n of Ry. Postal Clerks vs. Scott (C. C. A. 2nd, 1907), 155 Fed. 92, 94.

In reversing a judgment for the plaintiff in an action upon an accident policy, the court stated on page 94:

"But, let it be assumed that there was sufficient dispute upon the testimony to warrant the submission of the question as to his previous health to the jury, how then stands the case? The entire fabric of the defendant's liability is built upon the theory that Scott received an injury on November 1, 1902, at Cuba, which caused his death. This is the keystone of the plaintiff's case; if it be removed the entire structure falls to the ground. We have searched the record in vain for evidence of such an injury or, indeed, of any injury, on that day. The plaintiff testified that when her husband left home on the last day of October he was in good health, with no wound on his leg and that when he returned at 4 o'clock on November 1st he appeared sick, feeble and

weary. There was a bruise on his left shin five or six inches long and two or three inches wide; it looked red. * * *

"When, where or how this bruise was received does not appear. There is no proof that it was received at Cuba on November 1st. In fact the testimony of the trainmen is to the effect that Scott performed his duties as usual that day. He said nothing about an accident and they heard of none. The postal clerk at Hornellsville, in whose office Scott was required to register, saw him November 1st. He also saw him on his next trip November 3d. He said he was going to Cattaraugus to vote. On the night of election day he went to Salamaca intending to take his usual trip in the morning. That night he was found at his boarding house, in Salamaca, by Dr. Bourne in a serious condition from which he was aroused by hypodermics of strychnine and digitalis. On the 6th of November he went to his home where he remained until December 18th, when he was taken to the home of his son, at Dunkirk, where he remained until his death. * * *

"It is true that he had a bruise on his left shin, but everything else regarding it is left to conjecture. Instead of proving an injury received at Cuba on November 1st severe enough to produce shock, the presence of shock caused by the injury and nephritis and heart disease resulting from shock, the plaintiff's logic is in the inverse order. The argument proceeds on the following hypotheses — that death on January 25, 1903, was caused by diseases which may have been produced by shock, that shock may be caused by a severe external injury, that a bruise on the skin indicates an external injury, therefore Scott must have received such an injury on

November 1st at Cuba. It will be observed that there is a fatal hiatus between the fact that death occurred and the conclusion that it was caused alone by an external injury.

"We are of the opinion, therefore, that the court should have directed a verdict for the defendant on the ground that the plaintiff had not sustained the onus of proving that Scott's death was caused alone by external violent and accidental means.

"As there was no direct proof of this fundamental fact and as plaintiff's contention regarding it rested only upon presumption and guesswork, it was the duty of the court to direct a verdict for the defendant.

Carnes vs. Iowa Traveling Men's Ass'n (1898), 106 Iowa 281, 76 N. W. 683, 684-685.

This was an action upon an accident policy to recover for the insured's death. In reversing a judgment for the plaintiff, the court held the proof offered to be insufficient to support the judgment, and stated on pages 684 and 685:

"There are three possible ways to account for Carnes' death: (1) He may have taken the morphine with the purpose of committing suicide; (2) he may have taken more than he intended—that is, several quarter-grain tablets instead of one or more; and (3) he may have intended to take the amount he did, and misjudged the effect it would produce. There is nothing in the evidence or surrounding circumstances pointing to suicide, and, as everyone is supposed to be endowed with the instinct of self-preserva-

tion, he will be presumed not to have voluntarily ended his life. He must then have either taken more morphine than he intended, or taken what he intended and misjudged its effects. If he took more than he intended—that is, intended to take one or two quarter grains, and by mistake or inadvertence took much more—this was accidental, and, if death was so caused, the beneficiary is entitled to recover. But suppose he took just the amount of morphine he intended, and misjudged the effect it would produce; may death so occasioned be said to result from an accidental cause? Webster defines 'accidental' as 'happening by chance or unexpectedly; taking place not according to the usual course of things' —and an 'accident,' as 'an event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event; chance; contingency. Such unforeseen, extraordinary, extraneous inference as is out of the range of ordinary calculation.' * * * It will be observed that this policy insures against death from an accidental cause, and not an accidental death. It is possible that under the definitions referred to the death of Carnes was accidental, but if he took the amount of morphine intended, and a result not anticipated occurred, then the cause of his death was not accidental, for he intended to do the very thing he did. The morphine was, under the circumstances, taken by design. The result only was unforeseen—unintended. This distinction was recognized by Judge Dyer in Barry vs. Association, 23 Fed. 712, who, in charging the jury, said: 'The term 'accident' is here used in its ordinary, popular sense, and in that sense it means happening by chance—unexpectedly; taking place not according to the usual course of things or not as expected. In other words, if a result is such as follows from ordinary means voluntarily employed, in a not

unusual or unexpected way, then, I suppose, it cannot be called a result effected by accidental means. But if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs, which produces the injury, then the injury has resulted from the accident or through accidental means.' See Id., 131 U. S. 100, 9 Sup. Ct. 775. In 3 Joyce, Ins. Sec. 2863, quoting from Clidero vs. Insurance Co., 29 Scot. L. R. 303, it is said that 'a person may do a certain act, the result of which act may produce unforeseen consequences, and may produce what is commonly called 'accidental' death, but the means are exactly what the man intended to use, and did use, and was prepared to use. The means were not accidental, but the result might be accidental.' See, also, Accident Co. vs. Carson (Ky), 30 S. W. 879. Now, it is impossible to say, from the evidence, whether Carnes took more morphine tablets than he intended to take, or whether he took just what he did intend, and misjudged their effects. Death might have been occasioned in either way, and one is as likely as the other. Under such circumstances, can it be left to the jury to guess which? The burden of proof was upon the plaintiff to show that death resulted from an accidental cause, and, the evidence leaving this unestablished, she failed to make out a case. It is said, however, that death will be presumed to have resulted from accident, and that the burden of proof is upon the defendant to show the contrary. But an examination of the cases does not sustain this contention. They go no further than to hold that, where the insured has introduced evidence tending to show an injury to be the result of an accident, the burden of proof is on the insurer to establish as a defense that the insured was within some exceptions of the policy. See Hess vs. Association

(Mich.), 70 N. W. 460; Badenfeld vs. Association, 154 Mass. 77, 27 N. E. 769; Association vs. Wiswell (Kan. Sup.), 44 Pac. 996. The plaintiff wholly failed to prove the cause to have been accidental, and this will not be presumed. It was necessary to do this in order to bring the case within the terms of the policy."

Continental Casualty Co. vs. Paul (1923), 209 Ala. 166, 95 So. 814.

This was an action upon an automobile insurance policy which insured the plaintiff against loss or damage to his automobile "resulting solely from accidental collision of such automobile with any moving or stationary object." In holding that a verdict should have been directed for the defendant by the court below, the court stated on pages 815 and 816:

"We recognize, of course, that what is referred as the scintilla doctrine prevails in this state, but this does not at all conflict with the equally well-known rule that a conclusion as to liability which rests upon speculation pure and simple is not the proper basis for a verdict. * * *

"In Am. Cast Iron Pipe Co. vs. Landrum, 183 Ala. 132, 62 South. 757, this court quoted with approval from the case of Patton vs. Tex. Pac. R. Co., 179 U. S. 658, 21 Sup Ct. 275, 45 L. Ed. 361, to the effect that, where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of

the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. In St. L. & S. F. R. Co. vs. Dorman, 205 Ala. 609, 89 South. 70, discussing this question, the court said:

"'Other plausible theories may be readily suggested. Whatever conclusion may be reached, it will rest upon speculation pure and simple—a choice merely of conjectures. This court has often declared that such a conclusion is not a proper basis for a verdict.'

"In the instant case the proof discloses without conflict that the car rolled down this embankment, 50 or 60 feet in height, from which rocks and large lumps of ore protruded, and the damages sustained may readily and most naturally be attributed to this fall.

"The burden rested upon the plaintiff to show, in the language of the policy as alleged in the complaint, that the damage sustained was the result of a collision with some object either moving or stationary. There was no evidence offered of the existence of any object with which the car did or could have collided. The car was stopped upon an incline—a sufficient incline to cause the plaintiff to place rocks behind the rear wheels. If the brakes failed to hold, and the car of its own momentum, without the application of exterior force, and simply in obedience to the law of gravity, rolled down the embankment to the bottom of this cut, we are clear to the view that the damages thus sustained would not be the result of a collision with 'any moving or stationary object.'

* * * * *

"If we are to speculate, other causes may be conjectured, but, as disclosed by our decisions,

verdicts may not be rested upon pure supposition or speculation, and the jury will not be permitted to merely guess as between a number of causes, where there is no satisfactory foundation in the testimony for the conclusion which they have reached."

Keefer vs. Pacific Mut. Life Ins. Co. (1902), 201 Pa. 448, 51 Atl. 366.

The court, in affirming a judgment for the defendant in an action upon an accident policy, stated on page 366:

"We have looked in vain for any evidence upon which could be based a finding that the death was caused by external, violent and accidental means. Nor is there room for any such inference to be reasonably drawn from anything in the proofs. It is only by drawing an inference from an inference, instead of from a fact, or by basing a presumption upon a presumption, that such a result can be reached. The plaintiff's right to recover was limited, under the terms of the policy, to death from violent, external and accidental causes. If death was the result of disease, the claim made here was without foundation. The burden of proof was upon the plaintiff and how was it sustained? The jury were asked to infer — First, that the plaintiff suffered a fall; second, that the fall was accidental, and not the result of disease, such as vertigo or cerebral apoplexy; third, that death resulted as a consequence of the fall. All this in the absence of an eyewitness to the fact of accidental or external injury, and without direct evidence that there was a fall. No one testified how, when or where it occurred. No where in the testimony does there appear anything more

than a conjecture that the death was caused by accident, rather than by disease. The physician who was in attendance upon the deceased for the two or three days intervening between the first seizure and the death, and who also made the post-mortem examination, was unable to speak with any certainty or conviction as to the cause of death. The expert medical testimony was strongly in support of the theory that death resulted from uraemic poison. Under such circumstances the finding of the jury that the cause of death was accidental and external could be nothing more than a mere guess. How could a conclusion thus reached be sustained, in the absence of any direct proof as to the fact, the cause, or the effect of a fall? No presumption can with safety be drawn from a presumption."

No Proof of Fatality Within Life of Policy

The policy expired at noon on January 1, 1927. There was no competent proof of any injury prior to that time.

In addition to the fact that the indefiniteness of the proof required the jury to speculate as to the manner in which Leslie J. Brownlee may have lost his life (assuming he is dead), its condition left the time of such occurrence equally subject to conjecture. The policy issued by appellee, as stipulated (53), expired at noon on January 1, 1927. On page 10 of his brief counsel for appellants concedes that it is necessary for appellants to establish that fatal injuries were sustained by the insured prior to that time.

When last seen on January 1, 1927, Brownlee, though tired, was otherwise in good condition and spirits. His exact position on the mountain when he separated from Feyerabend was not established other than that it was somewhere below Crater Rock. There was no proof of any crevasses in that vicinity. While the weather was cold it did not prevent the movement of men clad in mountain clothes, as is demonstrated by the activities of searchers during the following week. It was not definitely established that Brownlee separated from Feyerabend prior to noon on January 1, 1927, but even if this be assumed, there is no evidence whatever to show that he suffered any injury prior to 12 o'clock on that date.

On this branch of their case appellants are complaining that the court refused to permit a verdict based only on surmise and conjecture. Appellants' argument assumes that Brownlee separated from Feyerabend at eleven A. M., one hour before the policy of accident insurance expired. Appellants' evidence is to the effect that at that time Brownlee was well, that he was suitably clad, that he had food and drink, and that he had had experience in mountain climbing. There are no facts in this record from which an inference can be drawn that he met death or fatal injury within an hour after he left Feyerabend. If the jury had so found, its verdict would have been based on sympathy, not on evidence.

In discussion of a point previously covered we have shown that a jury is not permitted to speculate as to the cause of a death or injury. This line of authority is even more clearly applicable to the point now under discussion.

If we are wrong on all our other contentions we are certainly not mistaken in our claim that appellants have utterly failed to show the time at which Brownlee lost his life or sustained a fatal injury, if he is in fact dead.

Appellee is in no wise responsible for this unfortunate situation. Appellee's contract is the measure of its liability.

Liability must be predicated, if at all, on something that happened prior to noon on the 1st of January, 1927. The burden of proof rested on appellants. This means that if appellants were to prevail they must prove a death or fatal injury during the life of the policy.

LaVerne Coleman testified (Record, 65-66), that about ten-thirty on the morning of January 1, 1927, he saw two men above him on the mountain. Counsel for appellants agrees with us in the conclusion that these two men were Brownlee and Feyerabend (Appellants' Brief, 8). The evidence on this point is clear. Coleman testifies that when he last saw Brownlee and Feyerabend one of them was a hun-

dred feet or so higher on the mountain than the other. It is apparent from Feyerabend's testimony that when the young men separated they were at the same place and that they had some conversation (Record, 34-35, 42-43). Feyerabend gave Brownlee his compass and told Brownlee that a south course would take him to the highway. The time when Brownlee turned back could not have been earlier than eleven o'clock, as is assumed in appellants' argument.

There is evidence that a storm was raging on the mountain and that there are cliffs over which a pedestrian might fall. This testimony, with the admitted fact that Brownlee has not been seen since he parted with Feyerabend, makes up appellants' case.

There is certainly no proof of death or fatal injury sustained prior to noon on the first of January, 1927.

Death From Freezing

It is contended that death from freezing is a casualty covered by the policy and *Brady vs. Oregon Lumber Co., 117 Or. 188, 199,* is cited in support of this contention. This case involved a construction of *Section 6616 O. L.,* which is a part of the Workmen's Compensation Act. This statute, in so far as it is material for the present purposes, is as follows:

> "Every workman subject to this act while employed by an employer subject to this act, who after June 30th next following the taking effect

> of this act, while so employed sustains personal injury by accident arising out of and in the course of his employment and resulting in his disability * * * shall be entitled to receive from the industrial accident fund hereby created the sum or sums hereinafter specified."

There are circumstances under which loss of life or limb by freezing may constitute an accident. The circumstances outlined in the Brady case and in the Manitoba case cited on page 14 of appellants' brief are illustrative of this principle. But the facts of the case at bar take this case without the operation of this principle.

Brownlee and Feyerabend deliberately went to the highest mountain peak in Oregon on the first of January. They knew they would encounter severely cold weather. They each wore heavy woolen underwear, woolen hiking trousers, two pairs of woolen socks, rubber shoe packs, woolen shirts, two sweaters and over all of this clothing marine suits which made them water proof from head to foot. (Record, 31.) They did not expect to freeze to death, but they intentionally went to a place where death from freezing was a danger to be guarded against. They endeavored to protect themselves against freezing as a real danger.

In the Manitoba case cited on page 14 of appellants' brief an accident left the assured at an exposed place on the prairie when the weather unexpectedly became cold and stormy.

In the Brady case some workmen were marooned at a logging camp where work had ceased for the season. They considered that it was necessary to get out to a settlement, although the ground was covered by a heavy fall of snow. The snow prevented operation of the trains and left the workmen no other way of leaving the camp except walking.

The facts in the case at bar differentiate it from the facts in the above cases. Our policy does not cover death by freezing under the circumstances disclosed by the testimony.

The language of the policy relevant to this contention is as follows:

> "Mutual Benefit Health & Accident Association does hereby insure Leslie J. Brownlee against loss of life from bodily injuries sustained through purely accidental means."

A distinction is drawn by the authorities between an accidental death and a death by accidental means. The distinction is very clearly stated in a recent California case.

Moore vs. Fidelity & Casualty Co. of N. Y., 258 Pac. 375, 377.

The deceased was a trained nurse. She was called to a hospital in San Francisco to take care of a patient who was suffering from streptococcus septicaemia. It appeared that the infection from which

the patient was suffering could be communicated through his breath to anyone in the room with him. The deceased was aware of this fact and undertook to guard against it by gargling and otherwise. She nevertheless became infected and died as the result of the infection. The court said:

> "From the foregoing epitome of the record, appearing without conflict, it is now to be determined whether the showing thus made by the plaintiff was sufficient to establish that the assured suffered death by reason of 'bodily injury sustained * * * through accidental means' as provided in the policy. It will be assumed for the purposes of this case that the contraction of the infection by the assured was a bodily injury, but we are unable to conclude that such injury was caused by accidental means. The term 'accident' as used in similar policies has been given a definition in this state that is uniform and without substantial deviation. No difficulty is encountered with reference to the definition, but problems arise in applying the definition to particular and varying states of fact. The term 'accident' is defined as 'a casualty—something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person injured.' Richards vs. Travelers' Ins. Co., 89 Cal. 170, 26 P. 762, 23 Am. St. Rep. 455; Price vs. Occidental Life Ins. Co., 169 Cal. 800, 147 P. 1175; Southwestern Surety Ins. Co. vs. Pillsbury, 172 Cal. 768, 771, 158 P. 762; Olinsky vs. Railway Mail Ass'n, 182 Cal. 669, 189 P. 835, 14 A. L. R. 784. The burden is on the plaintiff to show that death ensued from a bodily injury sustained through accidental means. Postler vs. Travelers Ins. Co.,

173 Cal. 1, 6, 158 P. 1022; Mah See vs. North American Acc. Ind. Co., 190 Cal. 421, 213 P. 42, 26 A. L. R. 123. It must be borne in mind that the policy in question does not insure against accidental death, but against death through accidental means. 'A differentiation is made, therefore, between the result to the insured and the means which is the operative cause in producing this result. It is not enough that death or injury should be unexpected or unforeseen, but there must be some element of unexpectedness in the preceding act or occurrence which leads to the injury or death.' Rock vs. Travelers' Ins. Co., 172 Cal. 462, 465, 156 P. 1029, 1030 (L. R. A. 1916E, 1196).

"In the case at bar the means through which the fatal malady was contracted by the assured was neither unusual nor unexpected. There was no element of surprise in coming in contact with the virulent organisms. In fact, such contact was foreseen and expected. The assured knew and realized the dangers incident to the performance of her duties as an attending nurse, and by gargling, washing her hands, etc., took precautions to guard against the effect of the incident exposure. The fact that others similarly exposed did not contract the disease is not sufficient to prove that the assured contracted the same by accidental means. If the other persons present in the room from time to time (the sister and fiancee of the patient were more constantly at his bedside than the assured) had contracted the malady, there would have been no element of surprise or unexpectedness or of the unusual in so contracting the same, as they were all advised and warned of the dangers of their presence in the room. That such other persons did not fall a prey to what was an expected and anticipated attack from the germs would show no more than their resistance was greater and

> the attack unsuccessful. Effect must be given to the plain language of the policy, and a distinction must be made between the result to the assured and the means by which that result was brought about. It may properly be said that the result to the assured, namely, illness and death, was unexpected and unintentional, but that is far from saying that the means that produced the illness and subsequent death were unexpected, unusual, or not anticipated.

This decision is in line with an earlier California case cited in the opinion.

Postler vs. Travelers' Ins. Co., 173 Cal. 1, 158 Pac. 1022, 1023-1024.

The deceased in this case went to a gambling resort armed for the purpose of compelling those in charge of the resort to give him back some money he had lost in the games. In the fight which followed he lost his life. His wife was the beneficiary under an accident policy and she recovered judgment in the lower court. This judgment was reversed on appeal. We quote from the opinion of the court:

> "But the defendant relied, in addition, upon its denial that the injuries which caused Postler's death had been effected through accidental means. On this issue the burden of proof was upon the plaintiff. 'The plaintiff was bound to establish as a part of her case that death resulted from accident. It was not incumbent upon the defendant to negative accident. * * * In order to recover, the plaintiff was bound to allege and prove an injury of a kind covered by the con-

tract, i. e., one effected through external, violent and accidental means.' Price vs. Occidental Life Ins. Co., 169 Cal. 800, 802, 147 Pac. 1175; Jenkin vs. Pacific Mutual L. Ins. Co., 131 Cal. 121, 63 Pac. 180; Rock vs. Travelers Ins. Co., 156 Pac. 1029. The appellant contends, and we think upon good ground, that under any reasonable view of the evidence, the injuries suffered by Postler were not produced by accidental means, but were the natural and probable consequence of his own voluntary acts. In Western Commercial Travelers' Ass'n vs. Smith, 85 Fed. 401, 405, 29 C. C. A. 223, 227 (40 L. R. A. 653), the court said that:

'An effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of his deeds.' "

The foregoing distinction between accidental death and death sustained through accidental means is stressed in one of the cases which we have discussed under another heading of this brief.

Carnes vs. Iowa Travelling Men's Association, 106 Ia. 281, 76 N. W. 683, 684-685.

The Oregon court has announced this same rule.

Kendall vs. Travelers' Protective Assn., 87 Or. 179, 190, 191 192.

There was an attempt in this case to recover dam-

ages caused by blood poisoning in the removal of an ingrowing hair from the skin of the assured by a barber. The first opinion in the case was written by Mr. Justice Burnett. We quote therefrom:

> "We note that the defendant does not insure merely against injuries although they might constitute an unexpected effect. The damage, whether anticipated or not as a result, must have happened through accidental, violent and external means. All three of these ingredients must unite to form the cause of the subsequent hurt before there can be a recovery under the admitted terms laid down in the constitution and by-laws of the defendant. A man's leg might be broken by a runaway team coming suddenly upon him from behind. He might reasonably expect to be confined to his bed for some weeks and yet the cause of the fracture would be accidental. On the other hand, he might purposely inflict upon himself a slight pin scratch which would ordinarily pass unnoticed and septicaemia might ensue and unexpectedly amputation of the injured part might become necessary, yet the scratch would not be accidental. In other words, under such a policy as this the liability must be determined by causes rather than consequences.
>
> * * * * *
>
> "The jury might consider that it was impossible to perform the required operation without making some incision of the skin so as to reach the hair growing underneath, and that on that account the barber intentionally and with the implied consent at least of the plaintiff, made the cut which afterwards became infected. This would not be an unwarranted conclusion from the plaintiff's own testimony. If, therefore, the wound was made intentionally it would not come

within the meaning of the term 'accidental means.' ''

The case went back for retrial and plaintiff again secured judgment. This judgment was reversed by the Supreme Court, Mr. Justice Harris writing the opinion. *See 95 Or. 569, 574, 575.* We quote from the opinion:

> ''The court refused to give the following instruction requested by the defendant:
>
> 'The jury is instructed that if plaintiff directed the barber to remove the ingrowing hair from his chin, and the barber proceeded to remove the hair under instructions from plaintiff, plaintiff cannot recover in this case, even though the work of the barber was unskillfully done, and the results were such as neither plaintiff nor the barber anticipated.' ''
>
> * * * * *
>
> ''The refusal to give the instruction, as requested by the defendant, permitted the jury to find the element of accident in the unskillfulness of the barber, if there was any. Moreover, the requested instruction is in complete harmony with the announcement made by the opinion delivered on the first appeal that 'the liability must be determined by causes rather than consequences.' ''

This case has been cited with approval in the recent case of—

Dodeneau vs. State Industrial Acc. Com., 119 Or. 357, 361.

Here Mr. Justice Coshow said:

> "Oregon is committed to the first line of cases—that is in order for the insured to recover under the ordinary policy of accident insurance it is necessary for the injury to have been caused by accidental means; it is not sufficient that the result only should have been accidental; Kendall vs. Travelers' Protective Association, 87 Or. 179 (169 Pac. 751). An illustration of the liability of an insurer against accidental injury as construed in the Kendall case may be aptly made thus: A person accidentally scratches his hand on his tie pin which unknown to him protrudes beyond his tie. The scratch occurs by chance. It is a mishap. In itself it is trivial but owing to some unforeseen and unknown circumstances blood-poisoning results and death follows. The insurer would be liable under the policy. Another man intentionally uses his tie pin to remove a sliver in his hand or to open a blister and blood-poisoning unexpectedly results causing the insured's death. His beneficiaries cannot recover under the policy because he intentionally used the pin in the way and manner he did."

The application of these authorities to the case at bar is clear. Leslie Brownlee intentionally went on Mt. Hood in the winter. He anticipated cold weather and knew that freezing would occur if he remained out on the mountain indefinitely. He guarded against

this contingency by putting on the warmest kind of clothing and taking precautions which are set forth fully in the testimony of Mr. Al Feyerabend, who was appellants' principal witness. Brownlee did not expect to be frozen but the cold temperature, the snow and the storm were anticipated, and if he died as the result of these conditions he did not die by accidental means.

We have thought it our duty to make the foregoing argument, although there is no proof that Brownlee lost his life by freezing and the evidence strongly negatives any contention that he was frozen prior to noon of January 1, 1927, the time when the policy expired.

Appellants' Authorities

The authorities relied on by appellants are readily distinguishable from the case at bar. We have already discussed several of them. The remaining cases, with a single exception, are life insurance cases, and the excepted case is a libel in admiralty involving no question of accident insurance.

Fidelity Mutual vs. Mettler, 185 U. S. 308, 46 L. Ed. 922, 929.

This was an action brought on a life insurance policy taken out by William Gay Hunter. He disappeared for fifteen days. At the end of that time a

search was made for him and strong circumstantial evidence was produced tending to show that he had drowned in the Pecos River. This evidence is abstracted on pages 309 to 311 of the official report. The facts are wholly unlike the facts in the case at bar and it would serve no good purpose to publish them in this brief.

If the issues in the Mettler case had required proof that Hunter had died at a particular hour, we think the court would have been compelled to withdraw consideration of the case from the jury.

The San Rafael, 141 Fed. 270.

This is a decision of this court. It was an admiralty case growing out of the collision of the San Rafael and the Sausalito. The only portion of the opinion which is relied upon as relevant to the present controversy has to do with the claim based on the alleged death of Alexander Hall. Hall lived near Sacramento, where he had a family of seven minor children. He was a good father, mindful of his responsibilities to his children, and so circumstanced that there was no room for suspicion of suicide or of wilful disappearance. He left Sacramento with the intention of going to San Rafael to see his brother-in-law. The evidence traced him to the ferry Berkeley on which he left Oakland Mole on a schedule which permitted him to make the ferry San Rafael bound for Sausalito. There was evidence that a man

answering Hall's description was on the San Rafael at the time of the collision and that he was in a position on the San Rafael which would have made it almost impossible for him to escape drowning when the San Rafael sank. This court held that these facts were sufficient to prove the death of Hall, particularly in view of the length of time which had elapsed after his disappearance and before the trial.

Continental Life vs. Searing, 240 Fed. 653.

This was a decision by the Circuit Court of Appeals for the Third Circuit. Actions were brought on two life policies. The insured had been in bad shape physically. "The muscles of his foot were so bound that over-exertion tended to cramp his lower limbs." He also had "high blood pressure indicating heart deterioration." On the day when he was last seen he "complained of abdominal cramp" and "of being warm and tired." There was evidence that shortly before his disappearance he had over-exerted himself. Under these conditions the insured went in bathing in the surf at Atlantic City and was never seen again. He was actively engaged in business and so circumstanced that there was no foundation laid in the testimony for the suggestion that he had wilfully disappeared. The court held that under these circumstances, especially after the lapse of a considerable time, it was competent for the jury to find that the insured was dead.

Northwestern Mutual vs. Stevens, 71 Fed. 258, 261.

George D. Stevens was the cashier and manager of a bank. He had not accounted for funds which came into his hands. The capital of his bank was impaired and the bank examiner was about to close it. Under these circumstances he disappeared. His wife sued on insurance policies alleging that he was dead. Judge Sanborn, in discussing the case, used the language quoted on page 15 of appellants' brief. We do not regard this statement by the court as applicable to the facts in the case at bar, but in any event it was mere passing language of the court not called for by any of the facts which were in evidence in the case then under consideration.

Lancaster vs. Washington Life, 62 Mo. 121.

This was an action on a policy of life insurance on the life of Thomas H. Touhey. The evidence showed that the insured took passage from Chicago to Detroit on the Badger State. On the arrival of the vessel at Detroit he was missing. While the vessel was still in Lake Huron and nearing the southerly end of this lake Touhey had been seen on deck. He was in bad health and the circumstances indicated that he had jumped over or fallen over. It was held that the testimony was sufficient to entitle a jury to find that the insured was dead.

Carpenter vs. Supreme Council, 79 Mo. App. 597.

This action was based upon a fraternal certificate of insurance. The question mooted was the death of Carpenter who disappeared on the 3rd of January, 1897. He had been unfortunate in his business undertakings, had no income whatever, and was dependent on charity. He had frequently expressed an intention to commit suicide. The circumstances under which he left home on the day of his disappearance strongly indicated a suicidal purpose. He was last seen on the banks of the Mississippi River at St. Louis at a time when the river was full of ice. In the last conversation which the evidence disclosed he expressed a desire or intention to jump into the river. The court held that this testimony authorized the jury to find that Carpenter was dead.

Tisdale vs. Connecticut Mutual, 26 Ia. 170.

This was an action on a policy of life insurance. The insured visited Chicago on the 25th of September, 1866, on business. He was last seen at the corner of Lake and Clark streets in that city. He was a man of exemplary habits and happy domestic relations. He also had fair business prospects. His prolonged disappearance coupled with the foregoing facts was held to be evidence sufficient to submit to the jury the question of his death. The length of time that he had been missing at the time of the trial in the lower court does not appear but the case was decided on appeal more than two years after his disappearance.

CONCLUSION

The proof in the case at bar required the jury to speculate (1) as to whether Brownlee sustained any injuries within the terms of the policy, and (2) whether such injuries, if received, occurred prior to twelve o'clock noon on January 1, 1927. Because of this condition of the proof the direction of a verdict for appellee should be affirmed.

Respectfully submitted,

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